MAGISTRATE'S CRIMINAL APPEAL.

M. S. Mahendran for the appellant.

Inche Abdul Kadir (Federal Counsel) for the respondent.

Good J. : — This is an appeal against a conviction for an offence under section 6 of the Second-hand Dealers Ordinance, 1946, punishable under section 9. The main ground of appeal is that the Magistrate should have accepted the plea of *autrefois acquit* put forward at the trial and acquitted the appellant under section 302 (i) of the Criminal Procedure Code.

The charge alleged that the appellant had purchased brass, alloy, copper and zinc in contravention of section 6 of the Second-hand Dealers Ordinance. He had been previously tried on a charge under section 29 of the Minor Offences Ordinance, 1955, of being in possession of property reasonably suspected of being stolen and was acquitted.

In the present appeal counsel urged that the appellant had been tried on the same facts for an offence for which a different charge might have been made against him at the first trial under section 166 Criminal Procedure Code.

These cases always give rise to difficulty. There is no difficulty in interpreting the provisions of sub-sections (i) and (ii) of section 302 Criminal Procedure Code. The difficulty lies in determining which of the two sections 165 or 166 are applicable to the facts of a particular case. There is abundant authority, mostly from India, on this type of case but each case has to be looked at in the light of its own peculiar facts and circumstances in order to determine whether it comes within the provisions of section 302 (i) or those of section 302 (ii).

In a recent appeal the same point arose in connection with a trial for the offence of voluntarily causing hurt under section 323 Penal Code which had been preceded by a trial of the same person in respect of the same incident for the offence of disorderly behaviour in a public place under section 21 of the Minor Offences Ordinance, 1955. In that case counsel for the appellant urged, as counsel for the appellant has done in the present appeal, that the appellant had been tried again on the same facts for an offence for which he could not be tried by reason of the provisions of section 302 (i) Criminal Procedure Code. I held that while causing hurt to a person in a public place would probably always constitute disorderly behaviour it was not necessarily true that in the course of a single incident the disorderly behaviour and causing of hurt were one and the same act. I considered that there had been disorderly behaviour resulting in the causing of hurt, that the two acts could be distinguished, that at the first trial the accused could have been charged with both offences under section 165 Criminal Procedure Code and that therefore a plea of *autrefois convict* or *autrefois acquit* as the case might be was not available to him at the second trial under section 302 (ii).

I have come to the same conclusion in the present appeal. It appears to me that the possession of the property which was an ingredient of the charge at the first trial was the necessary consequence of the purchase of the property which was an ingredient of the charge at the second trial but that these were two separate and distinct acts so connected together as to form the same transaction. In my opinion, the accused could have been charged at the first trial with both offences under section 165 Criminal Procedure Code and I have therefore come to the conclusion that section 302 (ii) Criminal Procedure Code applies and that the Magistrate could properly try the accused at the second trial on the charge which is the occasion of the present appeal. For these reasons I dismiss the appeal.

Appeal dismissed.

Re CHIANG MENG OIL MILLS LTD.; *Ex parte* THE OFFICIAL RECEIVER

[A.C.J. (Whyatt C.J.) July 10, 1957]

[Singapore — Companies Winding-up No. 1 of 1950]

Companies Ordinance (Cap. 174) — Company — Winding-up — Creditors assigning debts — Whether Official Receiver can admit proof of debts by assignee.

In this application two creditors of the Chiang Meng Oil Mills Ltd. sought for an order that the decision of the Official Receiver and Liquidator of the company admitting proof of one Lim Boon Eng for $585,603 should be reversed or varied. Lim Boon Eng was not proving as an ordinary creditor but as the assignee of seventeen creditors pursuant to an order of the Court giving him liberty to do so. These seventeen creditors were ordinary trade creditors and if any one of them had filed a proof and claimed a dividend instead of assigning his debt to Lim Boon Eng, the Official Receiver would have admitted the proof.

Held: there is no reason why the Official Receiver should adopt a different attitude towards these debts because the proofs were submitted by a different person, particularly when that person had obtained the authority of the Court to prove in substitution for the assigning creditors.

If in the future, evidence becomes available to the Official Receiver which will enable him to prove that the transaction was in fact a fraudulent trick on other creditors, he could apply to the Court to have his proof expunged.

Cases referred to :—

(1) *Ex parte Culley* 9 Ch. D. 307.
(2) *Ex parte Dearle* 14 Q.B.D. 184.
(3) *In re Humber Ironworks Co.* L.R. 8 Eq. 123.
(4) *Ex parte Harper* 21 Ch. D. 537.

COMPANIES WINDING-UP.

K. Seth (*G. Abisheganaden* with him) for Lim Boon Eng.

J. E. Lloyd for the applicants.

A. W. Ghows for the Official Receiver.

Whyatt C.J. : — This is an application by two creditors of the Chiang Meng Oil Mills Ltd. for an order that the decision of the Official Receiver and Liquidator of the company, admitting the proof of Lim Boon Eng for $585,603 should be reversed or varied. The circumstances are unusual and raise questions of some importance.

A winding-up order was made against the company on a creditor's petition on the 5th June 1950 and after the first meetings of creditors and contributories had been held on the 18th October 1950, the Official Receiver became liquidator under section 198(2) of the Companies Ordinance. The company's statement of affairs showed a deficiency of $897,052 and the Official Receiver reported that in his opinion further inquiry concerning the promotion, formation and conduct of the business of the company was desirable. A public examination of the directors was held and as a result of that examination an accountant was appointed by the Court on the 1st August 1952 to investigate the affairs of the company. The report of the accountant was submitted in December 1952 and disclosed serious irregularities in the conduct of the business. Following upon the report, the Official Receiver, at the request and expense of three creditors (two of whom are the applicants in these proceedings), instituted proceedings against certain banks and the directors to set aside certain payments as fraudulent preferences and against the Chairman of Directors, Wee Kheng Whatt, for a declaration that he had acted fraudulently in the conduct of the business and should pay the Official Receiver the estimated deficiency of the company amounting to $779,091. Although these important proceedings were commenced in May 1953 they have not apparently been actively pursued and they are still pending.

The Official Receiver has, however, proceeded with the winding-up of the company during this period and the credit balance now in his hands which is available for distribution is $117,888 against which he has received proofs from sixty-three creditors amounting to $865,283. Seventeen of these creditors whose claims amount to $597,417 have assigned their debts to Lim Boon Eng for a total consideration of $208,928 and by an order of the Court made on the 6th February 1956 Lim Boon Eng was given liberty to prove these debts in substitution for the proofs put in by the assigning creditors and to lodge proof of his claim as such assignee and to participate in the first and all subsequent dividends. On the 29th February 1956 Lim Boon Eng filed his proof for $594,417 as assignee of the seventeen creditors and on the 10th September 1956, the Official Receiver held an enquiry into Lim Boon Eng's claim with a view to adjudicating upon it. At that enquiry the present applicants were represented by counsel and Lim Boon Eng was cross-examined for the purpose of showing that he was a relative by marriage of the Chairman of Directors, Wee Kheng Whatt, and with a view to ascertaining from whom and on what terms he had obtained the money to purchase these debts. On the 7th March 1957 the Official Receiver admitted Lim Boon Eng's proof for $589,603 and it is this decision which the applicants are now asking the Court to reverse or vary.

In support of their contention that the Official Receiver's decision should be reversed, the applicants advance two propositions, one of fact and the other of law. First, they contend that it has been proved that Lim Boon Eng is merely a bare trustee for Wee Kheng Whatt of the debt of $589,603, and secondly, they contend that if Lim Boon Eng is a bare trustee, then as a matter of law or at least, of practice, his claim should not be admitted unless the beneficial owner, Wee Kheng Whatt, also joins with him in his proof. It will be convenient to deal first with the question of fact.

It is, of course, natural that the approach to this question of fact should be influenced by the background of the accountant's report alleging serious irregularities in the conduct of the company's business and by the fact that proceedings alleging fraud and misfeasance have been instituted against the Chairman of Directors, Wee Kheng Whatt, but background facts are no substitute for proof in determining the simple issue, is Lim Boon Eng a bare trustee for Wee Kheng Whatt of this debt? It was established by cross-examination of Lim Boon Eng at the inquiry held by the Official Receiver before he adjudicated on this matter that Lim Boon Eng is a relative by marriage of Wee Kheng Whatt, having married the adopted daughter of Wee Kheng Whatt's brother, but this by itself proves nothing though it may in the circumstances of this case give rise to suspicion. He was further cross-examined as to how he had obtained the money to purchase these debts and no doubt if admissions could have been obtained that Wee Kheng Whatt provided the whole of it, free of interest, the inference would

have been that Lim Boon Eng was a bare trustee in this transaction for Wee Kheng Whatt. But the answers given by Lim Boon Eng fall far short of establishing this position. In answer to questions put in cross-examination he spoke of "the terms under which I obtained the money ..... to buy over these debts" which is, of course, consistent with his having obtained the money by way of loan. It was contended that the fact that he bought some of these debts at a time when he must have realised the assets would be insufficient to re-imburse him for his outlay showed that he was acting as agent for Wee Kheng Whatt who was seeking to gain control of the creditors' voting rights. It may well be that Wee Kheng Whatt had a strong motive to try and secure control of these voting rights but motive, like background, is no substitute for proof and I am unable to infer from this circumstance that the money for the purchase of these debts was provided solely by Wee Kheng Whatt. It is pertinent to observe that the affidavit in support of the application relies apparently upon belief and conjecture rather than proof, the deponent stating in paragraph 27 "I verily believe that the money used by Lim Boon Eng to purchase these claims was provided directly by Wee Kheng Whatt or indirectly by Wee Kheng Whatt through his son Wee Hian Seng". After giving the matter careful consideration, I have reached the conclusion that the question as to how Lim Boon Eng obtained this money and on what terms remains a matter of conjecture and suspicion rather than of proof and therefore the allegation that he is a bare trustee for Wee Kheng Whatt has not been established.

I should perhaps add that towards the end of the hearing of this Summons, counsel for the applicants, no doubt conscious of the difficulties of his case, asked that this issue of fact should be referred back to the Official Receiver to enable further questions to be put to Lim Boon Eng upon it. In my opinion it would not be right to adopt this course for two reasons. In the first place the Company winding-up rule under which this application is brought provides that the Court may reverse or vary the decision of the Official Receiver but makes no provision for sending the issue back to him for what would be virtually a re-hearing. Secondly, no new evidence or new facts have come to light since the Official Receiver adjudicated upon this matter and therefore the only purpose of sending it back would be in order to allow the applicants to cross-examine Lim Boon Eng a second time on substantially the same materials which in my view would not be a proper procedure.

Having regard to the conclusion I have reached on the question of fact, it becomes unnecessary for me to deal with the question of law but in view of the arguments addressed to the Court on this matter, I will state my opinion upon it. The applicants submitted, on the authority of *Ex parte Culley*[1] and *Ex parte Dearle*[2], that a bare trustee of a debt for an absolute beneficial owner is not entitled to present a bankruptcy petition against a debtor unless the *cestui que* trust joins as a co-petitioner; but this rule, as Cotton L.J. pointed out in *Ex parte Culley*[1], *supra*, is a rule of practice, not a rule of law. The learned editor of Bankruptcy in *Halsbury's* Laws of England (*Hailsham* Edition Vol. II page 279) states that "all trustees should if possible join in a proof and so also should all the *cestui que trustent* who are *sui juris*" but adds in a footnote that "possibly the same strictness would not be observable now in the case of a mere proof as where the proof is in respect of the petitioning creditor's debt." It is, however, significant that this comment and the footnote have been omitted from the *Simond's* edition of *Halsbury's* Laws of England which suggests, if it does no more, that the practice has now become obsolete.

The reason for this rule of practice is said to be that as against the *cestui que* trust the debtor might have an answer to the demand which might not be available to the trustee, and therefore unless the *cestui que* trust joined in the proof, the debtor's status might be altered and he might be made a bankrupt although no real debt was owing. It is clear, however, that the same considerations do not apply or do not apply with the same force, to proofs after a debtor has been adjudicated bankrupt and it is significant that counsel was not able to refer me to any case where the Official Receiver or trustee in bankruptcy had rejected a proof of a creditor which had been filed after an adjudication order, on the ground that the creditor was a bare trustee of the debt and the beneficial owner had not joined in the proof. Nevertheless the applicants submit that this rule of practice should be applied to creditors proving in a bankruptcy after an adjudication and furthermore that the rule should be extended to the winding-up of an insolvent company. It appears to me, however, that there is an important distinction between the state of affairs which exists before and after the presentation of a petition in bankruptcy and while it may be desirable in practice for the *cestui que* trust to join with the petitioning creditor to safeguard against the risk of a debtor being made bankrupt when there is in fact no real debt owing at all, the same considerations do not apply once his status has been changed and he has in fact been made a bankrupt. I think

there is no sufficient reason for extending this rule of practice generally to all proofs of debt in bankruptcy and in companies winding-up proceedings and certainly it has not been shown that such a rule is applied generally in other jurisdictions where the bankruptcy and company laws are similar to those in this Colony.

But the matter does not rest there so far as the present case is concerned. Lim Boon Eng is not proving as an ordinary creditor but as the assignee of seventeen creditors pursuant to an order of the Court giving him liberty to do so. These seventeen creditors are apparently ordinary trade creditors and if any one of them had filed a proof and claimed a dividend instead of assigning his debt to Lim Boon Eng, the Official Receiver would have admitted the proof without hesitation. I see no reason why the Official Receiver should adopt a different attitude towards these debts because the proofs are now submitted by a different person, particularly when that person has obtained the authority of the Court to prove in substitution for the assigning creditors. The position is not unlike that which arose in *In re Humber Ironworks Co.*[3] where, after a winding-up order had been made, some of the contributories bought up debts of the company and then claimed to prove for the full amount of the debts although they had paid much smaller sum for them. The liquidator raised objections to the proofs but the Master of the Rolls said that he had no doubt the claimants were entitled to prove for the full amount of the debts which they had bought. The position would, of course, be quite different if the purchase of the company's debts was a fraudulent trick to reduce the dividends of legitimate creditors and if that could be proved in the present case, the law of bankruptcy would be sufficient to enable the Official Receiver to meet the fraud. It was pointed out by Lord Jessel in *Ex parte Harper*[4] that a trustee in bankruptcy is entitled at any time to apply to expunge a proof in bankruptcy which has been wrongly admitted and the same rule applies in winding-up proceedings. I do not doubt that if in the future evidence becomes available to the Official Receiver which will enable him to prove that this transaction, at present clouded with suspicion, was in fact a fraudulent trick on other creditors, he will not hesitate to apply to the Court to have this proof expunged. However that may be, so far as the present application is concerned, I have, for the reasons which I have given, reached the conclusion that it must fail. The application is accordingly dismissed.

Costs to Lim Boon Eng on the higher scale.

Application dismissed.

Solicitors: *Battenberg & Talma; Drew & Napier.*

NAGALINGAM & ORS. v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Abdul Hamid and Buhagiar JJ.) April 8, 1957]

[K. L. — F.M. Criminal Appeal No. 45 of 1957]

Evidence — Identification parade — Statements made to police officers at — Whether admissible — Criminal Procedure Code (Cap. 6) s. 113 — Courts Ordinance, 1948, s. 29(1).

The appellants in this case were convicted of gang robbery in contravention of section 395 of the Penal Code. The question in issue was whether the accused were persons who had taken part in it, and the only ground of appeal which the Court felt it necessary to deal at length was that evidence was admitted of statements made to Police Officers at a Police investigation parade held in the course of the Police investigation.

Held: (1) by reason of section 113 of the Criminal Procedure Code (Cap. 6) statements made to Police Officers at a Police identification parade held in the course of a Police investigation, which must be taken to include actions such as the pointing out of persons in response to questions, were not admissible in evidence at the subsequent trial (**Lee Lian & Ors. v. Public Prosecutor**[1] approved);

(2) in this case although the evidence in question was wrongly admitted, it was never questioned that the robbery was committed and there was an overwhelming body of evidence to show that the appellants were participants in it, therefore the case was one which fell within the proviso to section 29(1) of the Courts Ordinance.

Case referred to:—

(1) *Lee Lian & Ors. v. Public Prosecutor* (1956) M.L.J. 191.

COURT OF APPEAL.

K. Chelvanayagam for the appellants.

H. S. Ong (Federal Counsel) for the respondent.

The judgment of the Court was delivered by:—

Thomson C.J.: — The four appellants in this case and a fifth man who has not appealed were convicted before the Chief Justice of gang robbery in contravention of section 395 of the Penal Code and sentenced to varying terms of imprisonment.

At the trial it was not disputed that a very serious gang robbery had been committed. The only question really in issue was whether the accused were persons who had taken part in it.

The conviction have been attacked in this Court on a number of grounds. As to all of these except one we content ourselves with observing that they are without substance. The only ground of appeal with which we feel it necessary to deal at length is that in the case of all the appellants (and also in the case of the accused who has not appealed) evidence was admited of statements made to Police Officers at a Police identification parade held in the course of the Police investigation.